

Ethics: Has HAL 9000 Finally Arrived? *Taylor* and Computers as Clients

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**Social Networks and Ethical Chaos:
Professional Responsibility Issues in Consumer Bankruptcy Cases**

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I. Social Media, Bankruptcy, and Ethics

A. *In re Taylor*

In a bankruptcy case straight out of Arthur C. Clarke’s classic *2001: A Space Odyssey*¹, a law firm and its client’s blind reliance on a computer system called NewTrak resulted in Rule 9011 sanctions levied against the client, the law firm representing it, and two of its attorneys.² NewTrak is a computer system that lenders upload partial or complete mortgage files to.³ The system then engages attorneys when there is a default; the attorneys have no contact with their “clients,” but may “open an issue” on the system.⁴ NewTrak was designed to streamline the proof of claim process and provide attorneys with necessary information in a quick and efficient manner, but the Taylor’s mortgage information in this case was incorrect.⁵ Because the attorneys only had access to the NewTrak system and not the actual client, they contended that the computerized information, showing the Taylors had not made their mortgage payments for several months was correct when applying for relief from the automatic stay.⁶ In fact, the Taylors had made their payments every month, less 180 dollars for premium flood insurance, which they contended they did not need.⁷ When asked why they had not contacted the lender via phone, the attorneys claimed communications had to be made thru the NewTrak system.⁸ The issue was not resolved until the parties sat down “with all relevant information and talk[ed] to each other,” and then it only took about an hour to confirm a plan that had waited six

months for electronic communications.⁹ The opinion’s conclusion includes a round criticism of NewTrak, cautioning users against abandoning their responsibility to do their diligence in favor of increasing volume and perceived efficiency by exclusively relying on the program.¹⁰ Although the initial sanctions against the law firm and individual attorneys were reversed on appeal to the district court,¹¹ the 3rd circuit reinstated the sanctions against all but one of the attorneys.¹² Judge Diane Weiss Sigmund, now retired, wrote the *Taylor* opinion, and in a recent article, described it as an example of the business model replacing the ethics model of legal practice.¹³

B. Social Media: Tools for Information or Traps for the Unwary?

The rise of social media sites such as Facebook has led to increased access to client and attorney information alike as well as increased temptation to either disregard or skirt ethics rules in the pursuit of such information, either about clients or potential adversaries. Additionally, considerable gray area in the model rules has led to much confusion in the legal community as to what is and is not allowed with regard to using information obtained from social networking and blog sites.

1. Facebook and Blog Do’s and Don’ts

¹ Stanley Kubrick, 1968

² *In re Taylor*, 407 B.R. 618 (E.D. Penn. 2009)

³ *Id.* at 623

⁴ *Id.*

⁵ *Id.* at 626 (The file contained both the incorrect note and incorrect payment information)

⁶ *Id.* at 628

⁷ *Id.*

⁸ *Id.* at 631

⁹ *Id.*

¹⁰ *Id.* at 651.

¹¹ *In re Taylor*, 09-CV-2479-JF, 2010 WL 624909 (E.D. Pa. Feb. 18, 2010) aff’d in part, vacated in part, rev’d in part, 655 F.3d 274 (3d Cir. 2011).

¹² *In re Taylor*, 655 F.3d 234 (3rd Cir. 2011).

¹³ Hon. Diane Weiss Sigmund, *Ethics, Economics, and Electronics: A Judicial View—The Taylor Case*, 2012 No. 2 NORTON BANKR. L. ADVISER 2 (Feb. 2012).

There are two different perspectives involved in the use of social media for information: attorneys using websites for their own posts and using them to obtain information about adversaries.

a. Attorneys and their own websites

The first, and most obvious advice for attorneys is not to have a Facebook page at all. The next best advice is to ensure that their page is protected by heightened security settings and that it doesn't contain potentially embarrassing posts or pictures.¹⁴ Most attorneys understand the potential dangers in maintaining a public, unsecure Facebook page, however, they may not see the danger in posting public blogs. In fact, in-house counsel often consult blogs when researching potential hires.¹⁵ But attorneys posting about cases or presiding judges may find themselves in violation of ethics rules. Take, for example, the situation Sean Conway found himself in. Conway, a Florida attorney, posted a blog about a judge he thought was intentionally and methodically depriving criminal defendants of their right to a speedy trial.¹⁶ After nothing came of a complaint

¹⁴ See Christopher Danzig, *Pennsylvania Judge Allows Facebook Fishing in Sucker Punch Lawsuit*, ABOVE THE LAW.COM (April 9, 2012), available at <http://www.thedailybeast.com/newsweek/blogs/the-human-condition/2010/07/20/10-ways-facebook-can-ruin-your-life.html> (revealing that a standard is emerging that allows discovery of private Facebook pages when the public page warrants a deeper probe).

¹⁵ Sarah Randag, *Blawgs Help In-House Counsel Decide on Hires, Survey Says*, ABA JOURNAL (May, 2010), available at http://www.abajournal.com/news/article/blawgs_help_in-house_counsel_decide_on_hires_survey_says/

¹⁶ Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's also Dangerous*, ABA JOURNAL (Feb. 1, 2011), available at <http://www.abajournal.com/magazine/article/seduced>

Conway filed with the judicial watchdog agency, he decided to take matters into his own hands.¹⁷ The Florida Bar found that the resulting post had violated five ethics rules and Conway received a public reprimand plus a \$1,250 fine.¹⁸

Another attorney, Illinois assistant public defender Kristine Pesheck, was suspended for 60 days after she shared private information about her clients on her blog.¹⁹

Additionally, attorneys and judges alike should take care in deciding who to "friend." Judge Carlton Terry, Jr. of North Carolina received a public reprimand after he friended an attorney who appeared before him regularly and the two men shared a few chat lines regarding a pending case.²⁰

While the ethical parameters of what lawyers may and may not do is still gray, it is apparent that attorneys should be very careful about the ways in which they let off steam or interact online.

b. Using social networking sites for information about others

Websites like Facebook and blog sites can provide a wealth of information, which can be ethically obtained, if attorneys avoid the traps for the unwary also contained in these sites. The problem is not with unprotected Facebook profiles and blogs; that information is public and therefore ethically obtainable. The problem

ed_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Debra Cassens Weiss, *Blogging Assistant PD Gets 60-Day Suspension for Posts on Little-Disguised Clients*, ABA JOURNAL (May 26, 2010), available at http://www.abajournal.com/news/article/blogging_assistant_pd_gets_60-day_suspension_for_posts_on_little-disguised/

²⁰ Seidenberg, *supra* note 15.

arises when a lawyer has to “friend” someone to obtain access to his or her profile. In that situation, ABA Model rules 4.1(a), forbidding a lawyer from making a “false statement of material fact or law to a third person,”²¹ 4.2, forbids “communication with a person represented by another attorney,” and 8.4(c), forbidding a lawyer from engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation,” are most often implicated.²¹

Under these rules, it is obviously unethical for an attorney to misrepresent herself to a potential witness, creditors, or debtors in order to gain access to his or her profile information. Additionally, it is unethical for an attorney to use a third party to friend potential witnesses, debtors, or creditors to litigation to obtain information.²²

But what if an attorney uses his actual information to “friend the enemy”? The answer depends on the bar. The New York City bar has held that an attorney can withhold strategic information when making a friend request, so long as she uses her real name and profile when making the request.²³ The Philadelphia bar

²¹ *Id.*

²² See The Philadelphia Bar Association Professional Guidance Committee Opinion 2009-002 (March 2009), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (finding the conduct of an attorney, who used an 18yr old woman to friend a witness and obtain information deceptive, in violation of Model Rule 8.4); see also Kate Dailey, *10 Ways Facebook Can Ruin Your Life*, THE DAILY BEAST (July 19, 2010), available at <http://www.thedailybeast.com/newsweek/blogs/the-human-condition/2010/07/20/10-ways-facebookcan-ruin-your-life.html> (Warning debtors that creditors will use Facebook to obtain information about their spending habits during and after bankruptcy proceedings).

²³ Seidenberg, *supra* note 15.

disagrees, condemning such a friend request as “omit[ting] a highly material fact.”²⁴

Bars also disagree on the appropriateness of attorneys friending judges. Kentucky, New York, and North Carolina allow it, while Florida has held that it is unethical.²⁵ With so much uncertainty it has become increasingly important for both judges and lawyers alike to research first and friend later.

2. Linked in: Improper Advertising v. Networking

Another potential ethical trap for lawyers involves improper advertising. A threshold question is whether ethics rules even apply to social media outlets: are linked in profiles and facebook pages conversations among friends, or advertising for attorney’s services?²⁶ Michael Downey, a partner at Hinshaw and Culbertson in St. Louis suggests that if the attorney can say “I am doing this to help myself get hired, it’s an ad.”²⁷

But what about services such as LinkedIn, which allow others to recommend attorneys and praise their work? If a client praises you on LinkedIn, could you get into trouble? Perhaps surprisingly, at least one bar thinks so.²⁸

Additionally, the South Carolina bar has stated that an attorney must act against too-favorable posts from clients on their own site.²⁹ The

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ The South Carolina bar has held that attorney recommendations on LinkedIn must comport with Model Rule 7.1 and not create “unjustified expectations or mislead a prospective client.” Ethics Advisory Committee of the South Carolina Bar, Ethics Advisory Opinion 09-10.

²⁹ The South Carolina Bar, Advisory Opinion 99-09 (1999) (The lawyer must tell the client to conform his comments with the model rules).

moral? Don't friend your clients and, if you do, warn them about the model rules and their potential impact on client posts.

C. Groupons for Legal Services

Perhaps a function of the recent dismal economic atmosphere, many law firms are rethinking their business models in an effort to resurrect profits. As a result, deal sites such as Groupon have become an attractive way for struggling attorneys to market themselves to prospective clients.³⁰

Recently the New York Bar released an opinion allowing for the use of "deal of the day" or "groupon coupon" websites, provided the advertising is "not misleading or deceptive" and clearly indicates that until the attorney can perform a conflict check, there is not an attorney client relationship.³¹ The opinion names a simple will as an example of a service ideally suited for such advertisement.³²

While there is not a Groupon for bankruptcy services yet, it's hard to imagine that one is not on the horizon, especially when one considers the number of "bankruptcy mills" out there.³³ Indeed, while not a Groupon, at least one Bankruptcy firm is offering coupons both for a free consultation and for one hundred dollars off of legal services.³⁴ It is unclear whether

³⁰ Nicole Black, *Legal Currents: NYS Ethics Committee on Using Groupon-Type Services*, INGHAM COUNTY LEGAL NEWS (March 29, 2012), available at <http://www.legalnews.com/ingham/1266716/>

³¹ New York State Bar Association Committee on Professional Ethics, Opinion 807 (Dec. 13, 2011), available at http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions825present/EO_897.pdf

³² *Id.*

³³ See BANKRUPT-LAW.COM, www.bankrupt-law.com/CutRateBankruptAdvice.htm (last visited April 15, 2012).

³⁴ 8COUPONS, <http://www.8coupons.com/discounts/ariano->

other bars will follow New York's example, but if so, Groupon could possibly represent a whole other advertising medium full of ethical traps for the unwary attorney.

II. Top Ten Apps. For Attorneys

Assuming the foregoing hasn't sent you running from both the internet and all forms of technology in general, the following is a list of top apps for bankruptcy attorneys:

1. U.S.C. Title 11: Bankruptcy
2. Bankruptcy II
3. Fastcase
4. Time Master + Billing
5. Quickoffice Pro HD
6. Dropbox
7. Evernote
8. ABA Journal
9. Dragon Dictation
10. LinkedIn

Conclusion

It appears that technological advances have evolved into a double-edged sword for attorneys. Social media sites provide a potential wealth of information on potential clients, witnesses, creditors, and debtors as well as a mine field of traps for the unwary. At the same time, programs such as NewTrak, designed to streamline the bankruptcy process run the danger of luring lawyers into a false sense of security, tempting them to run afoul of their duty of diligence to clients. For that reason, it's more important now than ever to think before you friend or post and research before you file.

repucci-bankruptcy-law-phoenix-85014 (last visited April 15, 2012)